UNITED STATES OF AMERICA
Before The
NATIONAL LABOR RELATIONS BOARD

LIFESOURCE	)	
	)	
and	)	**Case 13-CA-091617**
LOCAL 881, UNITED FOOD AND COMMERCIAL WORKERS	)	
	)	

RESPONSE TO NOTICE TO SHOW CAUSE AND
STATEMENT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Respondent, LifeSource ("LifeSource" or "Employer"), in response to the National Labor Relations Board's ("Board" or "NLRB") December 16, 2014 Notice to Show Cause, responds as follows:

1. This case arises out of the Board's Certification in NLRB Case 13-RC-074795 which states that Local 881, United Food and Commercial Workers ("Union") was certified as the exclusive collective bargaining representative in a bargaining unit consisting of all full-time and regular part-time Account Managers and Team Account Managers in the recruitment department employed by the Employer at its facility located at 5505 Pearl Street, Rosemont, Illinois; but excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act. (*See* Appendix A).

2. On March 30, 2012, an election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots was 11 for and 9 against the Petitioner, with one void ballot. The election was decided by a mere one vote, as the change of a single "yes" vote would have altered the outcome of the election. (*See* Appendix B).

3. The election was marred by a host of irregularities caused by the Board Agent's actions and inactions including, *inter alia,* (1) permitting both Observers to leave the voting room at the same time for extended periods without securing or taping the ballot box, (2) allowing voters to view and interact with the Excelsior list, thereby allowing everyone to see

who had and had not voted, and (3) the Board Agent herself leaving the voting place without securing the ballots, resulting in the whereabouts and treatment of the ballots during her absence being unknown.

The aforementioned irregularities caused by the Board Agent's actions and inactions evidence an utter disregard for: (1) the established and proven procedures set forth in the Board's Casehandling Manual, Part 2, Representation Proceedings; (2) the standards set forth in NLRB Form-722; (3) long-standing Board precedent governing election day conduct; and (4) employees' free choice and §7 rights on the question of union representation which resulted in a material effect on the election by destroying the mandatory laboratory conditions and creating an atmosphere that tended to cause confusion or fear of reprisals -- thus interfering with the employees' freedom of choice. Pure and simple, "laboratory conditions" do not exist when irregularities compromise the election playing field. As such, on April 6, 2012, the Employer filed Objections to Conduct Affecting the Results of the Election ("Employer's Objections"). (*See* Appendix C).

4. On May 7, 2012, the Regional Director for Region 13, Peter Sung Ohr, issued his Report on Objections. Despite expressly ***admitting*** in his Report that proper election procedures were not followed by the Board Agent, and ***without*** the benefit of a hearing to determine the veracity of the Employer's Objections and the extent and gravity of the Board Agent's malfeasance, the Regional Director concluded, upon what can only be described as pure surmise and conjuncture, that none of the grave irregularities raised in the Employer's Objections had, or could have had, an effect on the election and, thus, despite the Board's considerable precedent preserving the "laboratory conditions" standard, recommended that the Employer's Objections be overruled in their entirety and that a Certification of Representative issue. (*See* Appendix D).

5. On May 21, 2012, LifeSource filed Respondent's Exceptions to Report on Objections of Regional Director for Region 13 and Employer's Supplemental Exceptions and

Appendix to Report on Objections of Regional Director for Region 13 (the "Exceptions"). (*See* Appendix E). The Exceptions clearly demonstrate that the Regional Director's Report on Objections and method of reaching the conclusions contained therein was in direct contravention to long standing relevant Board and Circuit Court law. The Exceptions, therefore, sought that the Board not condone the Regional Director's departure from established and published administrative procedure and from Board and Circuit Court law precedent and that the election be set aside and a new election ordered or, at the absolute very least, a hearing be conducted to actually determine the extent of the departures from "laboratory" procedures and their potential impact on the integrity of the ballot protection process. In particular, the Exceptions objected to certain of the Regional Director's specific unsupported conclusions that:

> *(1) There is no evidence presented to suggest that there were any irregularities or the election was otherwise comprised as a result of the unsealed ballot box that was left with the Board Agent (while the observers were permitted to leave the polling station twice for ten (10) minutes each time.)*

As pointed out by LifeSource in its Exceptions, such conclusion is not only mistaken, but logically cannot be reached without a hearing involving testimony from the Board Agent, Observers for both parties and eligible voters. Except for the possibility of self-serving and job preserving statements from the Board Agent directly responsible for the irregularities, there is absolutely no basis or evidence for the Regional Director to reach such a conclusion. And, even if we were to assume such a basis on the record in this case, the employees in the bargaining unit and the Respondent on their behalf were entitled to test the integrity and veracity of that basis in a hearing with live testimony taken under oath. Indeed, *Sawyer Lumber, LLC*, 326 NLRB 1331 (1998), the sole case cited by the Regional Director in support of his conclusion, involved evidence **after** the parties had the benefit of a hearing with live, sworn testimony and the opportunity for direct and cross examination. Therefore, it is premature for the Regional Director in the instant case to conclude, without LifeSource having the benefit of subpoena or a hearing, that "*no evidence*" exists to suggest that the irregularities compromised

the result of the election and deprived employees of their freedom of choice without interference. How, where and why can the Regional Director reach such an absolute, unwavering conclusion when he prevents and prohibits examination of potential witnesses?

Further, because the Board Agent, in contravention of NLRB Form-722, permitted both of the Observers to leave the voting room for approximately ten (10) minutes each twice during the election, while leaving the ballot box unsecured, who knows and with certainty can predict what occurred or did not occur during those absences. It is unknown whether any voters came to vote during either of the periods where both Observers were absent and, if so, whether they were turned away or permitted to vote -- certainly not the Regional Director based on the record in this case. It cannot be determined whether any ballots were placed in the ballot box, or removed from it, during those times since the ballot box was unsecured. It is undisputed that at least one eligible voter did not cast a ballot. Further, it is unknown if either party engaged in impermissible electioneering at the polling area while the Observers were absent. The entire purpose of having Observers was contravened. Notably, the Regional Director's Report on Objections makes no reference to NLRB Form-722 which requires that Observers, *inter alia*, (1) "see that each voter deposits the ballot in the ballot box" and (2) "see that each voter leaves the voting area immediately after depositing the ballot." Contrary to the Report on Objections issued by the Regional Director, the required laboratory conditions for an election to proceed were, at the very least, jeopardized by the Board Agent permitting the Observers to leave the polling area twice for periods of ten (10) minutes each time without securing the ballot box.

As such, and as further explained below, the Report on Objections of the Regional Director should be overturned and a new election be ordered or, at the very least, a hearing must be held to determine the veracity of the Regional Director's findings and conclusions regarding the effects of the Board Agent's actions on the outcome of this extremely close election. *See Harry Lunstead Designs, Inc.*, 270 NLRB 1163 (1984) (holding that Board Agent's commission

of several deviations from Board rules for conducting an election interfered with the conduct of the election and as such a new election was ordered.). It can safely be assumed that the only evidence that the Regional Director could have obtained in this regard is from the Board Agent herself. At a minimum, there existed motivation for that Agent to "temper" her testimony. One can certainly argue much more, especially where there is no opportunity for hearing to test credibility and veracity. Surely, this Board would consider it a major departure from precedent to expose the integrity of the laboratory conditions standard to attack based solely on a self-interested and self-serving statement from one with a stake in the outcome without at least, at the minimum, the benefit of a hearing.

> *(2) The Board Agent's leaving the room while failing to secure the ballots, resulting in their whereabouts being unknown for at least ten (10) minutes, "could not have [had] any effect on the election," simply because (1) "neither observer handled the ballots," (2) "no one came into the polling area during the Board Agent's short absence" and (3) the "tally of ballots ... did not reflect any discrepancy between the number of ballots cast and the number of employees marked off on the voter eligibility list."*

In response to the Regional Director's wholly conclusory findings that the Board Agent's gross deviation from established NLRB procedures "could not have" had any effect on the election, LifeSource reasonably pointed out that "[t]o the contrary, as the Regional Director's Report on Objections points out, it is better procedure for the Board Agent to retain custody of the unmarked ballots at all times." The reason for this, which was not noted at all in the Regional Director's Report on Objections, is that, in cases such as this, where **no one** has any idea where the ballots are, there is a high likelihood of tampering or perceived tampering with the ballots and interference with the employees' free choice and §7 rights. How can one possibly profess that "laboratory conditions" have been maintained when there exists such a claim in the accountability of the ballots? For example, the issue of "chain voting," wherein an individual could have pre-marked ballots and coerced someone to turn it in, would not be picked up by the fact that the "tally of ballots ... did not reflect any discrepancy between the number of ballots

cast and the number of employees marked off on the voter eligibility list," as the Regional Director found. The Regional Director also relies on the marked voter eligibility list, and supposed lack of discrepancy, to support his conclusion, but such reliance is totally misplaced when the voting list was also left unattended by the Board Agent for ten (10) minutes. Anything could have been done to that list in the Board Agent's absence and, at a minimum, no inference could be drawn or conclusion be made from such a tainted list. To the contrary, with the ballot box and eligibility list both unsecured for ten (10) minutes and both out of the sight of both observers for another twenty (20) minutes, the much more logical inference and conclusion is that any and all integrity of the election process had been destroyed. There is clearly reasonable doubt with regard to the fairness and integrity of this election. See e.g., *Fresenius USA Manufacturing, Inc.*, 352 NLRB 679 (2008).

Conversely, such a finding supports a theory that chain voting possibly occurred, as no one can account for the whereabouts of the ballots during the time the Board Agent left the voting room without taking and securing the ballots. Thus, the Regional Director's statement that "[r]egardless of the location of the unmarked ballots, neither observer handled any ballots, both observers remained at the polling area table, and no one came in to the polling area during the Board Agent's short absence," only serves to confirm that if the ballots left with the Board Agent, and the Board Agent inadvertently set one down somewhere, the possibility of real or perceived chain voting exists.[1]

Therefore, contrary to the findings of the Regional Director, the Board Agent's failure to retain custody of the unmarked ballots at all times destroyed the required laboratory conditions by failing to maintain the required integrity of such ballots. As explained more fully

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[1] The Regional Director also errs as a factual matter when he describes the Board Agent's ten (10) minute absence, during which the whereabouts of the ballots are unaccounted for, as a "short absence." Suffice it to say that a lot can happen to ballots in ten (10) minutes, as it would only take someone seconds to swap ballots, mark a vote on a ballot or engage in any number of illicit actions that have the effect of depriving the employees' of their free choice, especially in an election where only a change of one (1) vote would completely alter the result.

below, the Report on Objections of the Regional Director should be overturned and a new election should be ordered or, at the very least, a hearing must be held to determine the whereabouts of the ballots and the voter eligibility list during the Board Agent's absence and whether or not any "chain voting" or other improprieties actually or could have occurred in order to fully preserve the employees' §7 rights. *See Fresenius USA Manufacturing, Inc.*, 352 NLRB 679 (2008), discussed *infra*, where the Board ruled that the Board Agent's mishandling of ballots necessitated a new election, particularly because the results of the election were close.

Furthermore, the employees in the voting unit, and the Employer on their behalf, deserve the opportunity to test the Regional Director's unsupported conclusions that the failure absolutely **could not** have any effect in the election, that **neither** Observer handled the ballots, that the voter eligibility list was not altered and that **no one** came into the voting area by way of sworn live testimony subject to direct and cross examination in a hearing. Without such a hearing, the employees in that voting unit are deprived of due process in the exercise of their §7 rights and the Regional Director is given unjustified and unfettered deference in derogation of those rights without the benefit of the integrity of live testimony in a hearing.

> *(3) (a) "... the actions engaged [in] by the Board Agent as described by the Employer were consistent with the procedure outlined in the [NLRB] Casehandling Manual, Part Two, Representation Proceedings [for Excelsior lists]" and that, (b) "[e]ven assuming an employee did see the list of employees as the Employer asserts, there is no evidence suggesting that this did, or could have, compromised or interfered with the election or free expression of the employees' choice."*

Because *neither* of the Regional Director's aforementioned conclusions find any support in the facts of this case, LifeSource excepted because the Regional Director's quotation from the NLRB's Casehandling Manual, Part Two, Representation Proceedings, ("NLRB manual") §1132.12 Procedure at Checking Table, to support his conclusion that the Board Agent followed the proper procedure for handling the Excelsior list was erroneous. In fact, this section, as quoted by the Regional Director, states that:

> At the checking table are a set of observers, who sit behind the table, and a Board agent, who sits at one end. Before them is part of the voting list applicable to that table. The approaching voters should be asked to call out their names, last names first, as they reach the table. They may also be asked for other identifying information, as necessary. Once a voter's name has been located on the eligibility list, all observers are satisfied as to the voter's identity and no one questions his/her voting status, each observer at the checking table should make a mark beside the name. Once a voter has been identified and checked off, the observers -- or one of them designated by the others -- should indicate this to the Board agent, who will then hand a ballot to the voter.

However, nothing in the above-quoted passage from the NLRB manual supports the Regional Director's conclusion that the Board Agent's actions "were consistent with the procedure outlined" in the NLRB manual. To the contrary, the NLRB manual, with good reason, does not contemplate voters either easily viewing, or studying the Excelsior list, nor physically interacting with it, all of which happened in this case as the voters approached the table with the list, looked at it, and pointed out their names on the list. This clearly is not what the NLRB Manual contemplates and the departure from the Manual is significant.

Second, the Regional Director's unfounded conclusion that such knowledge on the part of the voters as to who had voted "could not have" compromised or interfered with the election or free expression of the employees' choice is not supported by the undisputed facts. The "could not have" finding is based on absolutely unfounded pure surmise and nothing more. Where, in the record, is there any basis whatsoever for a conclusion that the conduct "would not have" interfered with employees' free choice? There is none. Furthermore, for example, if employee A noticed that employees B, C and D had not yet voted because he had studied the Excelsior list when he voted, he could easily go to employees B, C and D and convince them, or coerce them, into voting in the manner he preferred, or simply voting when they otherwise would have abstained, or abstaining when they otherwise would have voted. If employee A was able to secure an unmarked ballot, as it appears was possible in this case, employee A could require employees B, C and/or D to deposit a previously-marked ballot and require the employee to

return the unmarked ballot the employee obtains at the voting place (chain voting). The mere fact that someone knows whether or not one voted can, in and of itself, be very intimidating and coercive and that information can be used to facilitate voting irregularities, such as chain voting. In such a close election, where the final tally was 11-9 and the change of one "yes" vote to a "no" vote could swing the election in the other direction, employees being allowed to openly view the list of those who have and have not yet voted is not a matter that can be dismissed by a simple unfounded statement that such knowledge "had no effect" on the election. Without further evidence and a hearing, that amounts to pure speculation.

To the contrary, the knowledge the voters were given access to in this case by the way the Excelsior list was openly displayed by the Board Agent is analogous to allowing a voter or party representative to keep a list of who has voted -- an action explicitly prohibited by Board precedent. *See* NLRB Casehandling Manual, §11322.1 (prohibiting observers from making lists of those who have voted); *Sound Refining, Inc.*, 267 NLRB 1301 (1983) ("Contrary to the Regional Director, we find that Barber's listkeeping violated the Board's prohibition against the keeping of any list ... of employees who have or have not voted.") Further, the open presentment of the marked-up Excelsior list to all voters means that employees knew that lists of those who had and had not voted was likely kept. Employee knowledge that a list of voters may be kept by an individual is likewise prohibited by NLRB precedent. *See Sound Refining, supra* ("if 'it was either affirmatively shown or could be inferred from the circumstances, that the employees knew their names were being recorded' the election should be set aside"). The Regional Director's Report on Objections completely misses, and/or ignores, the potential coercive impact of eligible voters knowing that others, supporters of one outcome or the other, will know when and if they voted. The effect of this conduct on the employees' §7 rights cannot, and should not be trivialized as was done by the Regional Director.

Clearly then, and as explained further below, the Report on Objections of the Regional Director should be overturned and a new election be ordered or, at the very least, a

hearing must be held to determine whether or not permitting voters to maintain lists by way of the Board Agent's open display of the marked up Excelsior list had, or could have had, an effect on the outcome of this extremely close election and/or in any way may have interfered with the employees' §7 rights.

In its Exceptions, LifeSource reasonably asked that a new election be ordered or, at the very least, that the Regional Director order an evidentiary hearing at which the veracity of his conclusory findings could be tested and affirmatively supported or contradicted, on the basis that the Regional Director's findings and conclusions find no support in either the facts of the case or the law. As matters now stand, the Regional Director's Report trammels all over the employees' §7 rights potentially in order to avoid embarrassment to the Region for the failures of its Agent in the conduct of the election.

In its Exception 4, in support of the need for a hearing in order to protect the §7 rights of the employees and the rights of LifeSource as a party, LifeSource cited numerous errors in the Regional Director's findings and conclusions and cited a bevy of case law standing for the proposition that, in circumstances such as occurred in this case, a new election must be held. As such, LifeSource objected on the grounds that the Regional Director considered LifeSource's objections in a vacuum and did not consider the cumulative effect on the voters of the multitude of irregularities which occurred during this election. Rather, the Regional Director only considered each of LifeSource's objections one by one. Particularly glaring is the fact that the Regional Director did not make a determination on the cumulative effect of the multitude of the irregularities, given that the election result would change by the swing of only **one vote**. While the Regional Director casts off each of LifeSource's objections one by one as somehow being *de minimis*, more is required. Indeed, the Board has held that, "As such, the fact that there is no showing of actual interference with the free choice of any voter, or that no objection was raised at the time of the election, is of no moment." As this Board said "... confidence in, and respect for, established Board election procedures cannot be promoted by permitting the kind of conduct

involved herein to stand. Election rules which are designed to guarantee free choice must be strictly enforced against material breaches in every case, or they may as well be abandoned." *International Stamping Co.*, 97 NLRB 921 (1951) (internal quotations/citations omitted). In particular, the Board and courts have held that closer scrutiny applies and new elections should be ordered when a multitude of irregularities are found, particularly in a close election.

In *Fresenius USA Manufacturing, Inc.*, 352 NLRB 679 (2008), the Board was confronted with an issue, similar to that raised in LifeSource's third objection, wherein the Board considered the issue of a board agent who failed to secure "the ballots in a way to assure against any tampering, mishandling, or damage." Following a hearing, the hearing officer, similar to the Regional Director in the instant matter, "acknowledged that the Board Agent's handling of the ballot count did not comport with Board guidelines." He nonetheless found that these irregularities were not objectionable absent evidence that they actually affected the election results, and called the objections "speculative." *Id.* The Board, however, disagreed. The Board began its analysis by noting that it "goes to great lengths to ensure that the manner in which an election was conducted raises no reasonable doubt as to the fairness and validity of the election." *Id.* (internal quotations/citations omitted). While noting that there is not a "per se rule that ... elections must be set aside following any procedural irregularity," and that more than "mere speculative harm" must be shown to overturn an election, the Board "will set aside an election, however, if the irregularity is sufficient to raise a reasonable doubt as to the fairness and validity of the election." *Id.* (internal quotations/citations omitted). The Board then held that the employer's objections relating to the fact that the "Board agent did not secure the ballots against tampering or mishandling" were sufficient to put into question the outcome of the election. The Board noted that its "election procedures are designed to ensure both parties an opportunity to monitor the conduct of the election, ballot count, and determinative challenge procedure." *Id.* (internal quotations/citations omitted). The Board then held that:

> [w]e find it unnecessary to pass on whether the irregularities in this election, considered separately or in various combinations, would warrant setting aside the election. Rather, reviewing all the facts in this case, we find that the cumulative effect of these irregularities ... raises a reasonable doubt as to the fairness and validity of the election. This is especially so considering the closeness of the election, where even one mistake in the distribution or counting of the ballots could have altered the election outcome. (internal quotations/citations omitted).

The Board therefore set aside the election, as it should in the case of LifeSource, and ordered a second election. This precedent should be viewed as controlling in the instant proceeding.

In *RJR Archer, Inc.*, 274 NLRB 335 (1985), the Board held that "[d]uring a representation election the Board must provide a laboratory in which an experiment can be conducted, under conditions as nearly ideal as possible." *Id.* (internal quotations/citations omitted). The Board then considered the fact that numerous irregularities had arisen during the election, and held that, "... when viewed cumulatively (the irregularities) created an atmosphere ... in which a fair election could not be conducted." *Id.* (internal citations omitted). The Board further found that a new election should be held because not only were there multiple/cumulative irregularities, but also because the election was close. The Board held that the multitude of irregularities coupled with the close outcome warranted a new election and held that, "In these circumstances, especially where the election results were so close, we do not view the election as reflecting the free choice of the employees." *Id. See also, Cedars-Sinai Medical Center*, 342 NLRB 596 n. 21 (2004); *NLRB v. Service American Corporation*, 841 F.2d 191 (7th Cir. 1988); *Trimm Associates, Inc. v. NLRB.*, 351 F.3d 99 (3d Cir. 2003), wherein the Board and Circuit courts have held that additional scrutiny must be applied to objections when the vote is close.

In its Exception 5, in support of its right to a new hearing, LifeSource again cited numerous errors in the Regional Director's findings and conclusions and cited a plethora of case law standing for the proposition that in circumstances such as occurred in this election, *at the*

very least, an evidentiary hearing must be held.[2] LifeSource excepted because not only was it an error for the Regional Director to refuse to order a new election, but it was also an error for the Regional Director to not, at the very least, hold an evidentiary hearing to determine the veracity of his largely uncorroborated conclusions. This is particularly true here, where the Regional Director admitted that best practices were not followed in regards to how the election was conducted, no testimony was taken from any voters, the Board Agent, or the Union Observer -- despite a request from LifeSource to interview her, and the election result could be changed decided by a change of **one vote.**[3] As such, LifeSource has clearly raised substantial and material issues of fact to support a *prima facie* showing of objectionable conduct and is entitled under both Board and Circuit Court law to a hearing. Indeed, a "Regional Director is **required** under the Board's rules to direct a hearing if the objecting party raises substantial and material issues of fact to support a prima facie showing of objectionable conduct." *NLRB v. Service American Corporation*, 841 F.2d 191, 197 (7th Cir. 1988) (emphasis added).

The Board has similarly held that "the Board's Rules and Regulations make clear that ex parte investigations are not to be used to resolve substantial and material factual issues particularly where the factual issues turn on credibility. Rather, the rules specifically provide that a hearing **shall** be conducted with respect to those objections or challenges which the Regional Director concludes raise substantial and material factual issues." *Erie Coke & Chemical Company*, 261 NLRB 25 (1982). *Id.* (emphasis added, internal quotations/citations

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2 Such cases include, *inter alia, see Trimm Associates, Inc. v. NLRB,* 351 F.3d 99, 103-104 (3d Cir. 2003) (quoting and citing *NLRB v. Bristol Spring Mfg. Co.*, 579 F.2d 704, 707 (2d Cir. 1978); *NLRB v. Gooch Packing Co.*, 457 F.2d 361, 362 (5th Cir. 1972); and *NLRB v. Valley Bakery, Inc.*, 1 F.3d 769, 773 (9th Cir. 1993)), all of which hold that the necessity for a hearing is particularly great in a close election, and that under such circumstances, even minor misconduct cannot be summarily excused on the ground that it "could not have influenced the election."

3 The fact that LifeSource was unable to obtain a statement from the Union Observer, Board Agent or voters also weighs heavily in favor of ordering a hearing. *See Trimm Associates, Inc. v. NLRB.*, 351 F.3d 99, 106 (3d Cir. 2003) (holding that inherent constraints on discovery prior to a hearing weigh heavily in favor of conducting a hearing when a party raises substantial issues that, if resolved favorably, would warrant setting aside the election.) LifeSource requested of the Union Observer that she submit to an interview concerning the election day events, but she declined.

omitted). Thus, the Board in *Erie Coke* required that "the resolution of these conflicts by the Regional Director was improper and requires that we remand this proceeding for a further hearing." *Id.*

Indeed, the Regional Director's conclusions in this case were drawn nearly entirely, at most, by way of a very few *ex parte* interviews and without providing LifeSource the opportunity for a hearing or a compulsory process to obtain evidence. This is impermissible not only under the Board law cited above, but also under the law of the Seventh Circuit. See *NLRB v. Lovejoy Industries, Inc.*, 904 F.2d 397 (7th Cir. 1990) ("If the regional director thought he could resolve disputes and draw inferences on the basis of ex parte interviews with a few of Lovejoy's employees, without offering the employer either a hearing or compulsory process to obtain evidence, he was mistaken ... the regional director **must hold a hearing** when the employer presents facts sufficient to support a prima facie showing of objectionable conduct, that is, of misconduct sufficient to set aside the election under the substantive law of representational elections.") *Id.* at 399-400 (emphasis added). Moreover, a party is not required to establish that its objections must be sustained before obtaining an evidentiary hearing. *Id.* Indeed, "[t]he whole purpose for the hearing is to inquire into the allegations to determine whether they are meritorious; it makes little sense to expect the employer to prove its case, especially without power of subpoena, to the Regional Director before a hearing will be granted." *NLRB v. Service American Corporation*, 841 F.2d 191, 197 (7th Cir. 1988) (quoting *J-Wood/A Tapan Div.*, 720 F.2d 309, 315 (3d Cir. 1983)). *See also Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004) ("The Regional Director's finding ... was made without a hearing. The result is that the employees are deprived, at least for now, of their §7 rights on the question of union representation ... we have no lack of trust in our Regional Director. Rather, we simply rely on the traditional rule that genuine factual issues require a hearing."); and *Testing Service Corporation*, 193 NLRB 332 (1971) (directing Region 13 to hold a hearing and holding that, "since a factual question has been raised, we shall order that a hearing be held ...")

Finally, in its Exception 6, LifeSource argues that it has set forth numerous instances of objectionable conduct, which, if true, are more than sufficient to set aside the election, it has clearly established that not only should a new election be conducted, but, at the very least, a hearing must be held before a valid Certification of Representative can issue. Such irregularities as set forth above include, *inter alia*, (i) the high possibility of employees making lists of those who have voted with employees having knowledge of the same, (ii) the mystery regarding what the Board Agent did with the ballots when she left the polling location for approximately ten (10) minutes and (iii) what occurred in the polling location when both observers were absent two (2) times during the election for a total of twenty (20) minutes. Further, the fact that the change of **one vote** would change the outcome of the election, coupled with the numerous irregularities and lack of evidence supporting the Regional Director's Report on Objections, mandates that LifeSource **at least** have the benefit of a hearing. Numerous courts have held that when an election is "close," and it does not get any closer than **this** election, that a hearing **must be** held even if only minor misconduct is alleged to have occurred. "The necessity for a hearing is particularly great when an election is close, for under such circumstances, **even minor misconduct cannot be summarily excused on the ground that it could not have influenced the election.**" *See Trimm Associates, Inc. v. NLRB*, 351 F.3d 99, 103-104 (3d Cir. 2003) (quoting and citing, *NLRB v. Bristol Spring Mfg. Co.*, 579 F.2d 704, 707 (2d Cir. 1978) (emphasis added); *NLRB v. Gooch Packing Co.*, 457 F.2d 361, 362 (5th Cir. 1972); and *NLRB v. Valley Bakery, Inc.*, 1 F.3d 769, 773 (9th Cir. 1993)) (emphasis added). Therefore, because the Regional Director noted that irregularities occurred during the election, but "summarily excused" [them], without the benefit of testimony from material witnesses, on the ground that it "could not have influenced the election" the Report on Objections of the Regional Director must be overturned and a new election must be ordered, or, at the very least, a hearing must be held before a valid Certification of Representative can issue.

In conclusion, LifeSource noted in its Exceptions that, because of the numerous improprieties that occurred in an election where a change of **one** vote changes the outcome, and because LifeSource has presented **at least** a *prima facie* showing that objectionable conduct occurred, the election should be set aside and a new election should be ordered or, at the very least, a hearing must be conducted to permit LifeSource to prove its case and determine the veracity of the Regional Director's questionable findings and conclusions. *See also* Appendix E and *Clearwater Transport, Inc. v. N.L.R.B.,* 133 F.3d 1004 (7th Cir. 1998) ("The Board may not resolve factual disputes or draw inferences without offering the objecting party either a hearing or compulsory process to obtain evidence."); *N.L.R.B. v. Service American Corporation,* 841 F.2d 191 (7th Cir. 1988) ("[t]he whole purpose for the hearing is to inquire into the allegations to determine whether they are meritorious; it makes little sense to expect the employer to prove its case, especially without power of subpoena, to the Regional Director before a hearing will be granted"); *N.L.R.B. v. Silverman's Men's Wear, Inc.,* 656 F.2d 53 (3d Cir. 1981) ("Courts will insist on an evidentiary hearing when a party's objection raises substantial and material issues of fact ... in concluding that the objection was meritless prior to an evidentiary hearing, the Regional Director effectively deprived the Company of its right to a considered determination on that issue."); *Saint Gobain Abrasives, Inc.,* 342 NLRB 434 (2004) ("The Regional Director's finding ... was made without a hearing. The result is that the employees are deprived, at least for now, of their §7 rights on the question of union representation ... we have no lack of trust in our Regional Director. Rather, we simply rely on the traditional rule that genuine factual issues require a hearing."); *Testing Service Corporation,* 193 NLRB 332 (1971) ("since a factual question has been raised, we shall order that a hearing be held ...").

6. On September 19, 2012, the National Labor Relations Board, without any analysis of the serious factual and legal issues raised in LifeSource's Objections, adopted the Regional Director's findings and recommendations and issued a Certification of Representative. (*See* Appendix A).

7. On October 3, 2012 the Union demanded that LifeSource bargain with it concerning LifeSource's employees within the alleged established bargaining unit. (*See* Appendix F).

8. On October 15, 2012 LifeSource responded to the Union's October 3, 2012 letter stating its refusal to bargain with the Union because the Certificate of Representative is invalid. (*See* Appendix G).

9. On October 18, 2012 the Union filed an Unfair Labor Practice Charge against LifeSource alleging that LifeSource violated §§8(a)(1) and (5) of the Act on the basis that LifeSource "unlawfully refused to bargain with the Union." (*See* Appendix H).

10. On November 1, 2012, LifeSource, in response to a request by the Region 13, filed a position statement with the Regional Office submitting that it did not violate §§8(a)(1) and (5) of the Act since the underlying Certification of Representative was erroneously issued. (*See* Appendix I, which is incorporated herein by reference).

11. On November 1, 2012, the exact same day and within several hours of when LifeSource submitted its position statement, Region 13 issued a Complaint and Notice of Hearing. The timing clearly indicates that LifeSource's position statement, which Region 13 requested, was never considered by the Region, and further that the Region had pre-determined how it would decide the matter, much as it did with the Objections themselves without a hearing. (*See* Appendix J).

12. On November 15, 2012, LifeSource filed its Answer and Defenses to Complaint and Notice of Hearing. (*See* Appendix K).

13. Rather than direct a new election, or hold a hearing in response to LifeSource's Answer and Defenses to Complaint and Notice of Hearing, Region 13 filed Counsel for the Acting General Counsel's Motion for Summary Judgment on November 26, 2012, arguing that the Board should find all of the allegations of the Complaint to be true and

issue an appropriate Decision and an Order requiring Respondent to bargain in good faith with the Union. (*See* Appendix L, without attachments). 13. On November 26, 2012, the Board issued its Order Transferring Proceeding to the Board and Notice to Show Cause and on November 28, 2012 issued an amended version of said Order. (*See* Appendix M). Respondent filed its Response to Notice to Show Cause and Statement in Opposition to Motion for Summary Judgment on December 12, 2012 ("December 2012 Response"). (*See* Appendix N).

14. On December 21, 2012, the Board issued its Decision and Order ("2012 Order"), confirming the Union as the exclusive collective bargaining representative of the unit employees and finding that Respondent's refusal to bargain with the Union constituted an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act. 359 NLRB No. 45 (2012).

15. On January 14, 2013, Respondent filed its Petition for Review with the Court of Appeals for the Third Circuit. On January 29, 2013, the Board filed its Petition for Enforcement with the United States Court of Appeals for the Seventh Circuit. On April 16, 2013, the Third Circuit transferred the appeal to the Seventh Circuit. On December 2, 2014, the Seventh Circuit vacated the Board's Decision and Order and remanded for further proceedings in light of the United States Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). (*See* Appendix O).

16. On December 16, 2014, the Board issued its Decision, Certification of Representative, and Notice to Show Cause (2014 Decision). 361 NLRB No. 136 (2014). The Board acknowledged the constitutional infirmities of both the representation proceeding and its 2012 Order and noted the resulting opportunity it had to review the representation issues anew. Rather than utilizing that opportunity and actually analyzing the significant representation issues at hand, it adopted the findings of the Regional Director wholesale. The Board refused to overturn the election and re-issued the Certification of Representative as previously described herein. The Board then directed a Notice to Show Cause regarding the Respondent's refusal to bargain and set a specific schedule for the parties' pleadings.

17. On December 24, 2014, Region 13 issued its First Amended Complaint. (*See* Appendix P). Respondent filed its Answer and Defenses to First Amended Complaint on January 7, 2015 ("2015 Answer"). (*See* Appendix Q).

18. LifeSource submits that summary judgment is inappropriate for the reasons originally argued in its December 2012 Response and discussed below. It further submits that the passage of time resulting from improper appointments to the Board has cast serious doubt on the ability of the parties to now fairly conduct a hearing on Respondent's objections to the election, and also whether the outcome of the ballot is representative of the current make-up of the bargaining unit, requiring that the Certification of Representative be set aside and a new election be conducted.

19. Summary judgment is inappropriate because it is based on findings, recommendations and conclusions of a Regional Director who had no legal authority to act. Regional Director Ohr was appointed as Region 13 Regional Director on December 13, 2011, at a time when the Board was comprised of three members, including Mark G. Pearce, Brian Hayes and Craig Becker. The Third Circuit in *NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203 (3d Cir 2014), held that Member Becker's 2010 intrasession appointment was unconstitutional. This decision meant that the Board was comprised of only two properly-seated members when Ohr was appointed as Regional Director. Because the Board lacked a quorum, it had no authority to appoint Ohr as Regional Director. *New Process Steel v. NLRB*, 560 U.S. 2635 (2010) (holding that, *inter alia*, the Board cannot exercise its authority when its membership falls below three). Further, the Board's quorum deficiencies meant that the Board lacked the power to delegate its authority to appoint Regional Directors to its General Counsel. *See* Order Contingently Delegating Authority to the Chairman, the General Counsel, and the Chief Administrative Law Judge, 76 Fed. Reg. 73,719 (Nov. 29, 2011). General Counsel Lafe Solomon acted without authority when appointing Ohr. Thus, Ohr was without authority to act

on behalf of the Board, thus, all the actions of Region 13 in this matter, which all occurred while Mr. Ohr was Regional Director, are also void.

The Supreme Court's decision in *NLRB v. Noel Canning, et al.* does not change this result. 134 S.Ct. 2550 (2014). The Court held that Senate recesses of more than three (3) days but less than ten (10) days are presumptively too short to fall within the Recess Appointments Clause of the Constitution, Art. II, §2, cl. 3 ("Recess Appointments Clause"), a provision of the Constitution that gives the President of the United States power to appoint certain officers during a Senate recess. *Id.* at 2567. But the Court "stopped short of validating every appointment made during a recess ten days or longer. One might even read the majority opinion as to leave the door open for future challenges to some such appointments: from the proposition that shorter than ten days is *usually* too short it doesn't follow that ten days or longer is *always* long enough." *Teamsters Local Union No. 455 v. NLRB*, 765 F.3d 1198, 1201 (10th Cir. 2014) (emphasis in original).

The Supreme Court did not specifically decide the fate of Member Becker's appointment in *Noel Canning*, though it recognized that Member Becker's appointment was in question. 134 S.Ct. at 2558. While some Courts of Appeals have validated Member Becker's appointment since *Noel Canning*, their analyses rely almost solely upon the length of time of the recess during which he was appointed. *See Teamsters Local Union*, 765 F.3d at 1200-01 (noting that because Becker "was appointed during an intra-session recess exceeding two weeks ... there seems little reason to doubt the validity of [his] appointment."); *Mathew Enterprise v. NLRB*, 771 F.3d 812, 814 (D.C. Cir. 2014) ("Put simply, Noel Canning means that the President is permitted to make recess appointments during recesses of 10 or more days."); *Gestamp South Carolina* v. NLRB, 769 F.3d 254, 257-58 (4th Cir. 2014) ("[T]he recess appointment of Board Member Becker took place over a two-week recess in March 2010. Accordingly, we now hold that Board Member Becker was validly appointed to the Board when it issued the order in this case."). Admittedly, Member Becker was appointed during a recess that was of sufficient

duration for a valid appointment pursuant to *Noel Canning*. However, Member Becker was appointed in a fashion that undermines the otherwise legitimate reasons Presidents may make recess appointments.

In *Noel Canning*, the Supreme Court recognized that the historical practice of making recess appointments suggests that the President and the Senate realize that such appointments can be both necessary and appropriate in certain circumstances. 134 S.Ct. at 2560. The purpose of the Clause is to permit the President to obtain the assistance of subordinate officers while the Senate is unable to confirm them, not to allow the President to subvert the confirmation process of the Senate, which was intended by the Founders to be the primary method of appointment. *Id.* at 2560. Member Becker's appointment under the circumstances then at hand was neither necessary nor appropriate. Member Becker's appointment on March 27, 2010 occurred a mere one day into a recess of the Senate occurring March 26 through April 12, 2010. *Id.* at Appendix A to opinion of the Court. President Obama could easily have appointed Member Becker to the Board on any one of the days preceding his appointment. No legitimate reason existed to appoint Member Becker to a Board on which three other properly appointed members sat. "Members of the NLRB since 1935," NLRB.gov, accessed February 2, 2015 at http://www.nlrb.gov/who-we-are/board/members-nlrb-1935. Thus, the timing of the appointment could only be intended to bypass the usual Senate confirmation process because of the potential for difficulty in confirming Member Becker. This reasoning hardly renders his appointment necessary or appropriate. Further, it undermines the confirmation power of the Senate. Member Becker's invalid recess appointment renders Regional Director Ohr's appointment invalid for the reasons discussed *supra*, and the Board must set aside all actions by Ohr in the instant matter.

20. It is also apparent that, in concluding that summary judgment should not be granted, the Board must also vacate its reissuance of the Certification of Representative due to the significant delay in this case due to the Board's failure to hold a hearing, since the delay casts

serious doubt that a fair hearing on Respondent's objections can be held. The election occurred on March 20, 2012 -- almost three (3) years ago. Respondent recognizes that the simple lapse of time is not sufficient to relieve an employer of its duty to bargain and that a bare assertion of employee turnover does not result in doubt regarding the union's majority status. *N.L.R.B. v. Western Temporary Svcs.*, 821 F.2d 1258, 1270 (7th Cir. 1987). However, Courts recognize that they may refuse to enforce a Board order in unusual circumstances or in situations of harmful and unjustifiable delay. *N.L.R.B. v. Katz*, 701 F.2d 703, 709 (7th Cir. 1983). *See also, N.L.R.B. v. Connecticut Foundry Co.*, 688 F.2d 871, 881 (2d Cir. 1982); *N.L.R.B v. Nixon Gear, Inc.*, 649 F.2d 906, 914 (2d Cir. 1981); *Continental Web Press v. N.L.R.B.*, 742 F.2d 1087, 1094-95 (7th Cir. 1984); *Mosey Mfg. Co. v. N.L.R.B.*, 701 F.2d 610, 613 (7th Cir. 1983); *National Posters v. N.L.R.B.*, 885 F.2d 175, 180-181 (4th Cir. 1989).

Such unusual circumstances exist here. In fact, a new election is necessary because a hearing will not rectify the harms that occurred in this case. Courts reviewing Board enforcement orders that were issued without a hearing in narrowly decided elections have applied equity principles and decided not to enforce those orders. These courts rely on the fact that the delay caused by the Board's failure to hold a hearing significantly decreased the possibility of the employer's prevailing at a hearing because "the labor force at the Company has undoubtedly changed since the election, and there is no way of knowing at this time if the Union enjoys a majority of support." *Nixon Gear*, 649 F.2d at 914, quoted in *Connecticut Foundry*, 688 F.2d at 881; *Katz*, 701 F.2d at 709. Further, these courts note that because of the lengthy delay, witnesses' memories fade and key witnesses may no longer be available. *Nixon Gear, supra*, 649 F.2d at 906; *Connecticut Foundry, supra*, 688 F.2d at 881; *Katz*, 701 F.2d at 709.

The instant matter is completely analogous to these cases. The Board improperly and erroneously failed to hold a hearing on Respondent's objections in the instant matter, which is inexcusable particularly noting that the election was decided by one vote. Respondent's labor force has certainly changed in the now almost three (3) years between the initial election and the

instant pleading, and significantly more time will pass before the final disposition of this case. *See Continental Web Press*, 742 F.2d at 1094. Employee and witness memories have faded, and a key Respondent witness has moved across the country. The Board agent involved in these proceedings cannot ensure that her memory accurately portrays the details of the day. For these reasons, the Board cannot guarantee that a hearing would accurately reflect the facts occurring at the time of the election. Further, no one can be sure that the positions of Respondent's employees remain the same as they did at that distant point in time. Thus, to ensure that union representation properly reflects the free choice of the employees involved here, the Board must set aside the election held in 2012 and hold another representation proceeding. *See Mosey Mfg. Co.*, 701 F.2d at 613.

To be sure, the delay in the instant case is not the fault of Respondent. Nor did it result from the normal processes of administrative and judicial review, but rather, from a significant change in circumstances at the Board. Because of the judicial effects of the Noel Canning decision, the Board's invalid Certification of Representative and decision on election irregularities was issued some two (2) years and eight (8) months after the election. Further, remands and rebriefing due to the Noel Canning decision have caused a lengthy delay and cost to the employer, caused primarily by the Board and not by Respondent. *Mosey Mfg. Co.*, 701 F.2d at 613; *N.L.R.B. v. Chicago Marine Containers*, 745 F.2d 493 (7th Cir. 1984); *Connecticut Foundry Co.*, 688 F.2d at 881. Respondent has diligently and timely contested the representation proceedings from the outset; its actions in pursuing its objections were legitimate and not designed to postpone any obligation to bargain. *See Western Temporary Svcs.*, 821 F.2d at 1270. Respondent was subjected to protracted litigation and expense through no fault of its own. Such unusual circumstances call for the Board to abandon its 2014 Decision and order a new representation proceeding altogether.

Finally, the Section 7 rights of the employees in the bargaining unit should be paramount. Representation elections are intended to provide employees with the collective

bargaining representative of their choice. The employees in the bargaining unit today, in 2015 as opposed to in 2012, are entitled to their Section 7 rights. Those employees differ from the employees present in 2012. In a case such as this, where the considerable delay is attributable to the Board itself, and a fair hearing on the 2012 events cannot be conducted, the present employees should not be deprived of their rights under the Act without having a say in that decision. The current employees are entitled to a secret ballot election to ensure the exercise of their rights under Section 7.

21. LifeSource submits that summary judgment is inappropriate because (1) there are outstanding issues of material fact in this case including, *inter alia,* the effect the numerous electoral improprieties discussed *supra* (*see* paragraph 3) had on LifeSource employee's free choice and §7 rights on the question of union representation -- facts that could only have been determined after affording LifeSource a hearing and/or opportunity for compulsory process and (2) because, as a matter of law, the Certificate of Representative was improperly issued as discussed *supra,* there can be no unlawful refusal to bargain with a union in violation of §8(a)(1) and (5) of the Act where the underlying Certification of Representative is invalid. As reflected in LifeSource's Exceptions to Report on Objections (Appendix E), Position Statement to the Region (Appendix I), and both of its Answer and Defenses to Complaint and Notice of Hearing (Appendix K), there is an abundance of factual and legal evidence in the record that establishes that the Certificate of Election is invalid and that the Board's 2014 Order must be vacated, the election and resulting Certification of Representative must be set aside, or at the very least a hearing be held, to determine the impact of the numerous electoral irregularities on LifeSource's employee's §7 rights to have free and unfettered choice on the question of union representation, but, more appropriately, a new election be ordered due to the passage of considerable time due to no fault of the parties and employees involved in this case.

WHEREFORE, LifeSource respectfully requests that the General Counsel's Motion for Summary Judgment be denied.

Respectfully submitted,

/s/ Ronald J. Andrykovitch

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Dated: February 6, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the RESPONSE TO NOTICE TO SHOW CAUSE AND STATEMENT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT has been served this 6th day of February, 2015 via electronic mail, upon:

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